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Supreme Court of the United States

October Term 1969

No. 241

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased, and Individually as the Widow and next of kin of WILLIAM CURRY, deceased,

Petitioner,

against

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD., (also operating as P. D. MARCHESSINI & CO., New York, Inc.),

Respondents,

against

ATLANTIC STEVEDORING CO., INC.,

Third-Party Respondent,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 16, 1969.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (McLean, D.J.) is reported at 274 F. Supp. 167 (1967), and is printed in full as part of the appendix to this petition.

The United States Court of Appeals for the Second Circuit affirmed without opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 16, 1969. The jurisdiction of this Court is involked under 28 U.S.C. § 1254 (1).

An extension of time until June 14, 1969 to file the within petition for a writ of certiorari was granted by Mr. Justice Harlan by order dated April 8, 1969.

Questions Presented

Is it the responsibility of our Federal Courts to fashion rules of substantive law in fatal maritime cases, or is the remedy for damages for wrongful death dependent upon the exegesis of the statute of each State?

Has the principle of maritime law established by the Court of Appeals in the case of *The Harrisburg,* 119 U.S. 199, 7 S. Ct. 140, kept apace with the advancement of the maritime industry, modern technology, the utilization of third party, including stevedoring services and insurance protection, so as to justify its continuation, or should our Admiralty Courts exercise their extensive responsibility of fashioning rules of substantive law which are primarily judge made law, as held in the case of *The M/V Tungus* v.

Skovgaard, 358 U.S. 588, 79 S. Ct. 503 [1], and reverse such holding [2] so as to eliminate situs of accident as a determining factor as to remedial rights for fatal maritime accidents?

Facts of the Case

The subject matter of the action was the wrongful death of William Curry, who was fatally injured on the 30th day of October, 1960, while working as a longshoreman on board the respondents' vessel *S.S. Eurylochus,* which was docked at a pier in Georgia. A broken band on a piece of cargo which was being hoisted caught the decendent's trouser, lifted him into the air and swung his body head down against the side of the ship, causing him to suffer fatal injuries.

District Judge McLean on the 8th day of June, 1967 granted respondents' motion for judgment on the pleadings on the basis that the action was barred by the two year Georgia statute of limitations, on the authority of *Tungus* v. *Skovgaard,* 358 U.S. 588, 79 S. Ct. 503.

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[1] Dissenting opinion by Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas join, concurring in part and dissenting in part, the Court stating at page 516:

> "Admiralty law is primarily judgemade law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314, 75 S. Ct. 368, 370, 99 L. Ed. 337; cf. The John G. Stevens, 170 U.S. 113, 126-127, 18 S. Ct. 544, 549-550, 42 L. Ed. 969. This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational. Admiralty law is an area where flexibility and creativity have been demonstrated in accomplishing this."

[2] The Supreme Court will not hesitate to exercise its discretion in considering changes that have taken place since a prior decision which justify its overruling its own prior decision. See: Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S. Ct. 1317, 1323.

The action was commenced on March 3, 1964. Jurisdiction was based on diversity of citizenship of the parties (28 U.S.C. § 1332).

Reasons for Granting the Writ

There is a conflict of decision as to whether the holding of the United States Supreme Court in the cases of *Just* v. *Chambers*, 312 U.S. 383, 61 S. Ct. 687, *Ghelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 38 S. Ct. 501, *Kuhn* v. *City of New York*, 274 N.Y. 118, 8 N.E. 2d 300 and *Riley* v. *Agwilines, Inc.*, 296 N.Y. 402, 73 N.E. 2d 718, which, in substance, held that State law afforded redress for maritime torts which resulted in death within the concept of the Saving Clause, 28 U.S.C. § 1333 (1), 28 U.S.C.A. § 1333 (1), to be recognized as essentially federal in their source and uniform in their application[3], to be administered as federal substantive law[4] and the contrary holdings that death claims based on breach of warranty of seaworthiness cannot be maintained unless federal law adopts an existing State death statute together with all ifs limitations, as held

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[3] ". . . it has long been settled that a state-created remedy for wrongful death will be enforced both in the admiralty courts and in proceedings under the saving clause when death results from a tort committed on navigable waters within a state whose statute provides such a remedy. The Hamilton, 1907, 207 U.S. 398, 28 S. Ct. 133, 52 L. Ed. 264; Western Fuel Co. v. Garcia, 1921, 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210; American Stevedpres v. Porello, 1947, 330 U.S. 446, 67 S. Ct. 847, 91 L. Ed. 1011, and the cases cited therein. See also the discussion in Just v. Chambers, supra." (O'Leary v. United States Line Company, 215 F. 2d 708, 711);

[4] "6. Judge Learned Hand's opinion in Guerrini v. United States, 2 Cir., 167 F. 2d 352, 354, took the view that the New York cases were decided as compelled by the federal law, as is amply evident from the opinions themselves." (The M/V Tungus v. Skovgaard, supra, p. 513);

in *The M/V Tungus* v. *Skovgaard*, supra; *United N.Y. & N.J. Sandy Hook Pilot's Assn.* v. *Halecki*, 358 U.S. 613, 79 S. Ct. 517; *Goett* v. *Union Carbide Co.*, 361 U.S. 340; *Hess* v. *U.S.*, 361 U.S. 314.

Argument

Admiralty law is not a tomb of petrified judicial decisions so inexorable as to be incompassionate to the true administration of justice.

A proper uniformity on essential matters of maritime cognizance is so deep rooted in federal law that when several States provide remedies in a comparable and general way, such universal feature of the common law system offers a sufficient basis for the operation of general maritime law in treating with wrongful death cases.

The adoption by admiralty of States' Wrongful Death Acts "cum onere" not only destroys uniformity of decision in treating with fatal accidents under identical circumstances, but creates the additional result that remedial rights which are granted to some of our citizens are denied to others, solely on the basis of the place of the accident.

The remedial rights predicated on breach of warranty of seaworthiness did not exist under common law, nor is the right to redress based on any statutory enactment. The fact is that the right to recover damages for breach of warranty of seaworthiness is one created by federal courts and is primarily judgemade law. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368; *The John G. Stevens*, 170 U.S. 113, 18 S. Ct. 544.

Up to the present time, this Court has repeatedly held maritime law did not create a cause of action for wrongful death.

This Court has held that maritime accidents due to breach of warranty of seaworthiness constitute a basis for recovery of damages for personal injuries short of death, but not for fatal injuries.

In accidents resulting in fatal injuries, federal courts have adopted State Wrongful Death Acts, together with expressed statute limitations.

The result has been that uniformity of admiralty decision has been completely destroyed when redress is accorded to some and withheld from other citizens of our country, solely on the basis of situe of accident, and that a widow and children in one State receive protection under the law of admiralty, whereas a widow and children in another State are denied redress by a comparable court of admiralty.

This practice of granting remedial rights for wrongful death on the basis of the site of the accident seems to be repugnant to the American concept of fair and impartial justice administered equally to all under identical circumstances.

Time has proven that justice would best be served by adopting the views by many Justices of the Supreme Court in their dissenting opinions that admiralty would not adopt Wrongful Death State Statute but would put it aside to fashion its own remedy for wrongful death.

See dissenting opinions in *The M/V Tungus* v. *Skovgaard*, supra, dissenting opinion by Mr. Justice Brennan with whom Chief Justice Black and Mr. Justice Douglas joined, concurring in part and dissenting in part; *United N.Y. & N.J. Sandy Hook Pilot's Assn.* v. *Halecki*, supra, dissenting opinion by Mr. Justice Brennan with whom Chief Justice Black and Mr. Justice Douglas joined; *Hess* v. *U.S.* supra, dissenting opinion by Mr. Justice Harlan with whom Mr. Justice Frankfurter joined.

CONCLUSION

It is respectfully submitted the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner

(APPENDIX)

Opinion and Order of McLean, *D. J.*

This is an action by the administratrix of a longshoreman who resided in Georgia to recover damages for his death which occurred, allegedly because of the unseaworthiness of defendant's vessel and cargo, while he was loading the vessel in Savannah, Georgia. Jurisdiction is based on diversity of citizenship.

Defendant moves pursuant to Rule 12(c) for judgment on the pleadings on two grounds: (1) that the action is barred by the two-year Georgia statute of limitations; (2) that the Georgia wrongful death statute does not encompass an action for death caused by unseaworthiness. Since the first ground is valid, it is unnecessary to consider the second.

The action is expressly based upon the Georgia wrongful death statute (Ga. Code Ann. § 105-1302, 1309 (1956)), as it must be, for the maritime law recognizes no cause of action for wrongful death of a longshoreman which does not occur on the high seas.

The Tungus v. *Skovgaard*, 358 U.S. 588 (1959).

Since the right of action is created by state statute, the state statute of limitations applicable to the action governs.

Western Fuel Co. v. *Garcia*, 257 U.S. 233 (1921).

Georgia Code Annotated § 3-1004 (1956) provides:

> "Actions for injuries to the person shall be brought within two years after the right of action accrues. . . ."

The Georgia courts have construed this statute to apply to death actions.

> *Atlantic, V. & W.R. Co.* v. *McDilda,* 135 Ga. 468, 54 S.E. 140 (1906);
> *Chapman* v. *Central of Georgia Ry.,* 20 Ga. App. 251, 92 S.E. 1025 (1917).

Curry's death occurred on October 30, 1961. The right of action then accrued.

> *Atlantic, V. & W.R. Co.* v. *McDilda, supra;*
> *Chapman* v. *Central of Georgia Ry., supra.*

This action was not begun until March 3, 1964. It was therefore begun too late.

There is no merit to the arguments advanced by plaintiff in an effort to avoid the statutory bar. The statute was not tolled by defendant's absence from Georgia. Judge Cannella has found on an earlier motion in this action that defendant was doing business in Georgia at the time of the accident and was amenable to service there.

> *Curry* v. *P. D. Marchessini, Inc.,* 64 Civ. 663 (S.D. N.Y. May 11, 1965).

The Georgia tolling statute (Ga. Code Ann. § 3-805 (1956)) applies only when a defendant who resided in Georgia when the cause of action accrued later removes temporarily from the state.

> *Miller* v. *Rackley,* 199 Ga. 370, 34 S.E. 2d 438 (1945).

That is not the case here.

Ga. Code Ann. § 3-808 (1956) which permits a plaintiff to recommence an action within six months after a non-suit,

discontinuance or dismissal of his prior action has no application to this case. The earlier proceeding referred to by plaintiff in this connection, *O'Keeffe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965), was a proceeding brought on behalf of Curry's widow to obtain compensation for his death under the Longshoremen's and Harbor Workers' Compensation Act. It was not non-suited, discontinued or dismissed within the meaning of the Georgia statute. On the contrary, although the district court held that the claim did not come within the Compensation Act, the Court of Appeals reversed and awarded compensation to Curry's widow.

Defendant's motion for judgment on the pleadings is granted.

So ordered.

Dated: June 8, 1967.

EDWARD C. MCLEAN
U. S. D. J.

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-nine.

Present:

HON J. EDWARD LUMBARD,
Chief Judge,
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

MARGARET CURRY, as Administratrix of the Estate of William Curry, deceased,
Plaintiff-Appellant,

v.

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD. (also operating as P. D. MARCHESSINI & CO., NEW YORK, INC.),
Defendants and Third-Party Plaintiffs-Appellees,

ATLANTIC STEVEDORING CO., INC.,
Third-Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudgment, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk